No. 92-311

Supreme Court, U.S.
FILED
FEB 18 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* LEGAL SERVICES OF NORTHERN CALIFORNIA, INC., AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF RESPONDENT

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February 17, 1993

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF OF *AMICI CURIAE* LEGAL SERVICES OF NORTHERN CALIFORNIA, INC. AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF RESPONDENTS 1

INTERESTS OF *AMICI* 1

STATEMENT OF THE ISSUE 3

SUMMARY OF ARGUMENT 9

ARGUMENT:

I. RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT WAS TIMELY FILED 11

A. The EAJA filing period may only be triggered by a district court judgment entered after the claimant has won entitlement to benefits 11

B. The Court's decisions in *Finkelstein* and *Melkonyan* do not require abandonment of the procedure approved in *Hudson* 15

C. The Secretary's proposed EAJA application procedure in fourth sentence remand cases is contrary to the statutory prescription for the application, and will needlessly waste vast resources of disability claimants and the courts 19

II. EVEN IF THE SECRETARY'S INTERPRETATION OF THE APPROPRIATE PERIOD FOR EAJA APPLICATIONS IN CASES INVOLVING FOURTH SENTENCE REMANDS IS CORRECT, THE COURT'S HOLDING IN *HUDSON* CANNOT BE LIMITED TO SIXTH SENTENCE REMANDS 22

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Audette v. Sec'y of HHS, 776 F.Supp. 84 (D.R.I. 1991) 21

Bowen v. Galbreath, 485 U.S. 74 (1988) 20, 28, 29

Brown v. Sec'y of HHS, 747 F.2d 878 (3d Cir. 1984) 14

Butts v. Bowen, 775 F.Supp. 1167 (N.D.Ill. 1991), *reaff'd*, 778 F.Supp. 453 (N.D.Ill. 1991) 25

Carrillo v. Bowen, 636 F.Supp. 99 (D.Ariz. 1985) 26

Commissioner, INS v. Jean, 446 U.S. 154 (1990) 28

Defrancesco v. Sullivan, 803 F.Supp. 1132 (N.D.Ill. 1992) 25, 28

Desrouchers v. Heckler, 701 F.Supp. 753 (D.Nev. 1988) 24

Dow v. Sullivan, 774 F.Supp. 46 (D.Me. 1991) 21

Fergason v. Sullivan, 771 F.Supp. 1008 (W.D.Mo. 1991) 16

Frizzell v. Sullivan, 937 F.2d 254 (5th Cir. 1991) 26

Gagnon v. Sullivan, 792 F.Supp. 873 (D.Me. 1991) 21

Hafner v. Sullivan, 972 F.2d 249 (8th Cir. 1992). 6, 17, 19

Hawkins v. Sullivan, 608 F.Supp. 1201 (D.Kan. 1985) 25

Key v. Sullivan, 925 F.2d 1056 (7th Cir. 1991) 26

Labrie v. Sec'y of HHS, 976 F.2d 779 (1st Cir. 1992) 6, 17, 20, 22

Lindner v. Sullivan, 799 F.Supp. 888 (N.D.Ill. 1992) 25

Lopez v. Sullivan, 780 F.Supp. 496 (N.D.Ill. 1992) 21

TABLE OF AUTHORITIES - Continued

Page

Melkonyan v. Sullivan, 111 S.Ct. 2157 (1991) ..... *passim*

Mills v. Sullivan, 782 F.Supp. 1347 (W.D.Mo. 1992) 21

Misciagno v. Sec'y of HHS, 786 F.Supp. 1120 (E.D.N.Y. 1992) 25

Myers v. Sullivan, 916 F.2d 659 (11th Cir. 1991) 30

Parsons v. Sullivan, 140 F.R.D. 352 (S.D.Ohio 1992) .19, 21

Phayboun v. Sullivan, No. S-909-225 EJG/PAN (E.D. Cal. Sept. 4, 1992) (unpublished) 6, 7

Pierce v. Heckler, 620 F.Supp. 320 (D.Ariz. 1985) 26

Prasad v. Sullivan, No. C-90-1435 SC (N.D.Cal Nov. 21, 1991) (unpublished) 17

Reeves v. Bowen, 841 F.2d 383 (11th Cir. 1988), *reh'g denied*, 860 F.2d 1009 (11th Cir. 1988) 24

Rivera-Sanchez v. Sec'y of HHS, 786 F.Supp. 147 (D.Puerto Rico 1992) 24

Rodriguez v. Sec'y of HHS, 794 F.Supp. 58 (D.Puerto Rico 1992) 8

Rosado v. Bowen, 823 F.2d 40 (2d Cir. 1987) 24

Rollins v. Sullivan, 784 F.Supp. 253 (E.D.Pa. 1992) ... 21

Russell v. Sullivan, 930 F.2d 1443 (9th Cir. 1991) 20

Sansano v. Sullivan, 788 F.Supp. 218 (D.N.J. 1992) 29

Schweiker v. Wilson, 450 U.S. 221 (1981) 28

Sesker v. Sullivan, 779 F.Supp. 1042 (W.D.Mo. 1991) 21

Spurlock v. Sullivan, 783 F.Supp. 474 (N.D.Cal. 1992), *reaff'd*, 790 F.Supp. 979 (N.D.Cal. 1992) .21, 23

TABLE OF AUTHORITIES – Continued

Page

Sullivan v. Finkelstein, 496 U.S. 617 (1990) ..... *passim*

Sullivan v. Hudson, 490 U.S. 877 (1989) ..... *passim*

Sullivan v. Sullivan, 738 F.Supp. 332 (W.D.Mo. 1990) 25

Taylor v. Heckler, 608 F.Supp. 1255 (D.N.J. 1985) 20

Thomas for Brown v. Sullivan, 785 F.Supp. 788 (C.D. Ill. 1992) 21

Wilson v. Heckler, 610 F.Supp. 120 (W.D.Mo. 1985) 27

Xiong v. Sullivan, No. CIV-S-91-0860 DFL GRH (E.D.Cal. Feb. 2, 1993) (unpublished) 21

STATUTES

Pub.L.No. 99-80, § 3 (1988), 99 Stat. 186 (28 U.S.C. § 2412 note) 20

The Equal Access to Justice Act, 28 U.S.C. § 2412(d) *et seq.* 12

28 U.S.C. § 1291 18

28 U.S.C. § 2412(d)(1)(A) 4, 12, 13, 15, 19, 24

28 U.S.C. § 2412(d)(1)(B) 10, 14

28 U.S.C. § 2412(d)(2)(B) 19

The Social Security Act, Title II, 42 U.S.C. § 401 et seq. 28

42 U.S.C. § 405(g) ..... *passim*

42 U.S.C. § 406(b) 20, 29

The Social Security Act, Title XVI, 42 U.S.C. § 1381 *et seq.* 28

TABLE OF AUTHORITIES – Continued

Page

RULES AND REGULATIONS

Fed.R.Civ.P. 11 19

20 C.F.R. § 404.621(a)(1)(ii) 29

20 C.F.R. § 404.976(b) 23

20 C.F.R. § 416.335 29

45 C.F.R. § 1614.2 2

57 Fed.Reg. 48619 (Oct. 27, 1991) 29

54 Fed.Reg. 37,789, 37,791 (1989) 14

MISCELLANEOUS

H.R.Rep. No. 120, 99th Cong., 1st Sess. 18 n.26 *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 146 n.26 5

S.Rep.No. 96-253, p. 5 (1979) 12, 24

Social Security Administration, *Annual Report to Congress* (Apr. 1992) 20

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INTERESTS OF *AMICI*

This brief is filed, with the consent of the parties, on behalf of Legal Services of Northern California, Inc. (LSNC) and the National Senior Citizens Law Center (NSCLC). Legal Services of Northern California, Inc. is a non-profit agency providing free civil legal services to low income residents of northern California in the areas of civil rights, health, housing, and public benefits.

National Senior Citizens Law Center is a non-profit agency specializing in legal issues affecting the elderly

poor. NSCLC practices law in support of legal services programs on behalf of elderly poor clients and client groups. As a nationwide support center, NSCLC assists attorneys in field programs funded by the Legal Services Corporation or the Administration on Aging. Substantive areas of practice include Social Security and Supplemental Security Income, Medicare, Medicaid, nursing home and home care issues, pensions, and age discrimination.

Over the years LSNC and NSCLC have represented thousands of poor persons, and have appeared a number of times before this Court, with respect to a wide variety of issues arising under Titles II and XVI of the Social Security Act. In addition, both LSNC and NSCLC provide counselling and assistance to members of the private bar who represent low-income persons in disability appeals. LSNC, in particular, refers numerous low-income claimants for disability benefits to members of the private disability bar for representation, pursuant to its obligation as a legal services organization to encourage private bar involvement in the provision of legal assistance to low-income persons. *See* 45 C.F.R. § 1614.2. Often the only potential source of adequate compensation for these advocates, especially where the claim for benefits arises under the Supplemental Security Income program, is through the Equal Access to Justice Act (EAJA).[1] The radical interpretation urged by the Secretary of Health

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[1] LSNC and NSCLC also have developed considerable expertise in litigating EAJA issues, particularly in the context of cases arising under the Social Security Act. Counsel for *amici* have lodged an extensive *amicus* brief in the case of *Engelbrite v. Sullivan*, No. 91-16920 (9th Cir.), which the Secretary has identified as raising the same issues as are presented in this case. Pet. Br. at 20 n.13.

and Human Services of this Court's recent series of decisions implicating the availability of EAJA fees under the Social Security Act would drastically limit a disability claimant's entitlement to EAJA fees in most cases, and would significantly impair the ability of *amici* to assist poor, often destitute clients seeking to challenge the wrongful denial of disability benefits.

The Secretary's position in this case calls into question the ability of hundreds of non-profit legal services organizations like *amici* to recover EAJA fees for the extensive post-litigation administrative advocacy necessary to successfully resolve the vast majority of disability appeals now remanded by the district courts. Equally significant would be the impact of the Secretary's position upon the efforts of *amici* and similar organizations to assist thousands of needy disabled clients through referrals to private attorneys who, until recently, were willing to undertake such representation primarily because of the potential for eventual compensation under the EAJA. *Amici* therefore are filing this brief to present the issues from the perspective of those individuals most in need of the level playing field Congress intended the EAJA to create for claimants compelled to vindicate meritorious applications for disability benefits through litigation against the federal government.

STATEMENT OF THE ISSUE

Less than four years ago this Court, in the context of a typical disability benefits appeal remanded by the district court pursuant to 42 U.S.C. § 405(g) for correction of legal errors committed by the Secretary, made the undisputed observation that jurisdiction routinely is retained

over such a case, pending conclusion of the administrative proceedings on remand, in order to entertain a post-remand application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). The Court went on to hold that in such an application the plaintiff may seek compensation for counsel's time incurred in both the litigation and the administrative proceedings on remand. *Sullivan v. Hudson*, 490 U.S. 877, 885-90 (1989). This holding made eminent sense in light of the Court's recognition that, as a general matter, a disability claimant who obtains a judicial remand for further proceedings does not qualify as a "prevailing party," for purposes of EAJA entitlement under 28 U.S.C. § 2412(d)(1)(A), until after he or she has won a final administrative award of benefits. *Id.* at 886-87.

A year later, in distinguishing between the "finality" of remands ordered pursuant to the fourth and sixth sentences of § 405(g) for purposes of the Secretary's ability to obtain immediate appellate review, the Court reaffirmed its conclusion in *Hudson* that

> [t]he purpose of the EAJA [is] to counterbalance the financial disincentives to vindicating rights against the Government through litigation; given this purpose, we could not believe that Congress would "throw the Social Security claimant a lifeline it knew was a foot short" by denying her attorney's fees for the mandatory proceedings on remand.

Sullivan v. Finkelstein, 496 U.S. 617, 630 (1990), quoting *Hudson*, 490 U.S. at 890.

Finally, just eighteen months ago, in determining that the "final judgment" triggering the thirty day limitations period for EAJA fee applications in § 405(g) cases must be a judgment entered by a court, and not an administrative

decision, the Court emphasized that "[o]ur decision in *Sullivan v. Hudson* is not to the contrary." *Melkonyan v. Sullivan*, 111 S.Ct. 2157, 2162 (1991). However, the Court then moved beyond its narrow holding on the statutory definition of "final judgment," and included a discussion which at least implied that in so-called "sentence four" remands (i.e., those remands ordered for correction of legal error, such as the one at issue in *Hudson*), the EAJA filing period may begin to run ninety days after issuance of the remand order, long before the administrative proceedings on remand are completed. *Id.* at 2165.

Wielding this single *dictum* in a nation-wide effort to bar, as untimely, the post-remand EAJA applications submitted by the hundreds of disabled claimants who obtained fourth sentence remands prior to the *Melkonyan* decision, the Secretary has touched off an unprecedented avalanche of fee litigation in the lower federal courts. Yet these courts, which review disability claims and attendant EAJA applications virtually on a daily basis, from a unique perspective informed by their extraordinary degree of "direct interaction" with the administrative agency (*Hudson*, 490 U.S. at 885), have rejected the Secretary's position in overwhelming numbers. In so doing they have heeded the admonition of Congress not to construe the procedural requirements of the EAJA in an "overly technical" manner, so as to spring "a trap for the unwary resulting in the unwarranted denial of fees." H.R.Rep. No. 120, 99th Cong., 1st Sess. 18 n.26, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 146 n.26.[2]

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[2] As far as *amici* are aware, every Court of Appeals to consider the issue has rejected the Secretary's *Melkonyan*-related effort to bar, as untimely, the post-remand EAJA application of a

The torrent of EAJA litigation unleashed by the Secretary's largely unavailing efforts to persuade the courts that an EAJA application must be filed within ninety days of an unappealed fourth sentence remand order, notwithstanding the plaintiff's inability at that time to demonstrate the requisite "prevailing party" status for EAJA entitlement, thus far has arisen primarily in the context of cases such as this one, where the remand was ordered *prior* to the decision in *Melkonyan*. In these cases the Secretary's singular lack of success in denying disability claimants their attorney's fees, simply because prior to *Melkonyan* they faithfully and timely adhered to the prevailing rules governing the timing of EAJA applications in fourth sentence remand contexts, is no doubt driven in part by the judiciary's simple refusal to countenance such a patently unjust result.[3] This nearly universal rejection of the Secretary's positions rests, as one district judge put it, "on the largely unspoken assumption that [in *Melkonyan*] the Supreme Court could not have intended the result it apparently dictated, particularly since this result frustrates the very purpose of [the] EAJA."[4]

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disability plaintiff whose case was remanded prior to *Melkonyan*. *See infra* App. 1a (listing cases). For two particularly thorough discussions, *see Labrie v. Sec'y of HHS*, 976 F.2d 779 (1st Cir. 1992), and *Hafner v. Sullivan*, 972 F.2d 249 (8th Cir. 1992).

[3] Set forth *infra* App. 2a-4a are forty-nine published decisions of the district courts, arranged according to the various analyses they have employed in rejecting the Secretary's *Melkonyan*-related arguments raised in connection with plaintiff's entitlement to attorney's fees under the EAJA. The four published contrary decisions (of which *amici* are aware) adopting the Secretary's position are listed at *infra* App. 5a.

[4] *Phayboun v. Sullivan*, No. S-90-225 EJG/PAN (E.D.Cal. Sept. 4, 1992) (unpublished), at 15. The unpublished decisions of

The raw unfairness resulting from the Secretary's effort to retroactively impose his calculation of the appropriate EAJA filing period upon cases involving pre-*Melkonyan* fourth sentence remands has thus far focussed judicial attention upon that category of cases. However, the Secretary correctly recognizes that "the number of such [cases] will diminish rapidly in the near future," as the last of the pre-*Melkonyan* cases meander their way through the inexorable internal processes of the Social Security Administration. Pet. Br. at 30 n.18. Accordingly, the Secretary asserts that his interpretation of *Finkelstein* and *Melkonyan*, which requires the filing of an EAJA application within ninety days of all unappealed fourth sentence remands, will provide a "clear rule" to benefit not only the district courts but the "thousands of litigants" who will encounter this timeliness issue in the future. Pet. Br. at 30.

Notwithstanding the Secretary's professed concern for these "thousands" of disabled persons whose claims he will wrongly deny, he certainly has not initiated litigation over this issue across the nation simply to establish a bright line governing the timing of EAJA applications, particularly since the line drawn by the Court in *Hudson* is perfectly clear, and has the added benefit of directing a result which comports with common sense. The Secretary's true interest in this case is in fact far more tangible

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the district courts rejecting the Secretary's timeliness arguments are legion, and certainly no less extensive (or creative) in their analyses than their published counterparts. For example, the unpublished memorandum decision in *Phayboun v. Sullivan* was forty-three pages in length. Copies of all unpublished decisions referenced in this brief have been lodged with the Clerk and served on the parties.

than the establishment of a definitive EAJA application procedure. Although that interest lies, for the most part, obscured within his measured arguments, it surfaces unadorned in this single sentence within his brief: "In short, *Finkelstein* and *Melkonyan* necessarily limit *Hudson* to cases remanded pursuant to sentence six." Pet. Br. at 25.

This single sentence reveals what the Secretary's position in this case is really about: money. If this Court's holding in *Hudson* allowing EAJA compensation for time expended in post-remand administrative proceedings is limited to sentence six remands, then *Hudson* will become an empty shell, and no more than a handful of the thousands of disabled persons who annually overturn the wrongful denial of their claims, with the assistance of a remand from the federal court, may possibly hope to recover EAJA fees for the substantial time incurred in the laborious post-remand proceedings. Indeed, the acceptance of the Secretary's position will foreclose EAJA entitlement in the very cases where fee awards are most appropriate, i.e., in those not infrequent cases where, following an initial fourth sentence remand, the unreasonable and often obdurate conduct of the agency necessitates years of multiple post-remand hearings, rehearings, and subsequent litigation in which the claimant is bounced between various administrative and judicial review levels as if, in the words of one district court, the agency was engaged in a "ping-pong" match.[5]

Finally, and most disturbing, this Court's endorsement of the Secretary's position would undoubtedly

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[5] *Rodriguez v. Secretary of HHS*, 794 F.Supp. 58, 59 (D.Puerto Rico 1992); *see infra* at 25 & n.19.

cause a significant reduction in the number of attorneys willing to undertake federal court representation of disability claimants, in light of counsel's inability to obtain EAJA compensation for the extensive proceedings on remand which almost invariably are required to secure a final award of benefits. Even worse is the fact that those persons most in need of competent representation to vindicate their disability claims under Title XVI of the Social Security Act (the SSI program), who by definition are needy and seeking only a subsistence level income, will suffer the most if the Secretary's agenda for vitiating *Hudson* is adopted, because those (already few) attorneys willing to represent such claimants have no effective incentive to do so apart from the possibility of EAJA fees.

The Secretary has seized the opportunity arising from the confusion generated by *Melkonyan*'s discussion of EAJA *procedure* to try and score a stunning *substantive* EAJA victory, through a decision which would excise the very heart of this Court's holding in *Hudson*. The Secretary's invitation to nullify *Hudson* would turn the EAJA on its head, and should be resoundingly refused.

SUMMARY OF ARGUMENT

a. The extended analysis of this Court in *Sullivan v. Hudson*, 490 U.S. 877 (1989), sensibly recognized that in cases remanded pursuant to 42 U.S.C. § 405(g) for correction of legal error committed by the Secretary in evaluating plaintiff's claim, the "final judgment" triggering the filing period for a fee application under the EAJA cannot be entered until after the administrative proceedings on remand have been completed. This must be so because the standard described in *Hudson* for qualification as a

"prevailing party" under the EAJA, to which the Secretary still adheres, cannot be met until after the administrative proceedings on remand have been completed. Respondent in this case complied with the procedure approved in *Hudson*, and which had been endorsed by the Secretary both in litigation and regulatory comment, by returning to the district court for entry of a post-remand judgment to confirm his entitlement to benefits.

b. This Court's decisions in *Finkelstein v. Sullivan*, 496 U.S. 617 (1990), and *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991), were not intended, as the Secretary now argues, to severely limit the substantive scope of the EAJA, and to effectively nullify the substantive holding in *Hudson*, by requiring claimants in the vast majority of cases remanded under § 405(g) to file fee applications *before* their threshold qualifications for EAJA entitlement are established. Reaffirmation of the EAJA filing period delineated in *Hudson* will disturb neither the Court's holding in *Finkelstein*, which simply permitted the Secretary to immediately appeal an order remanding the case for correction of legal and factual errors, nor the Court's holding in *Melkonyan*, which established that the EAJA "final judgment" described in 28 U.S.C. § 2412(d)(1)(B) requires a judgment filed by the court, and not the administrative agency.

c. The EAJA filing procedure suggested by the Secretary is grossly inefficient and would needlessly waste the resources of litigants and courts alike. Its principle intent is to substantively vitiate the Court's decision in *Hudson*, which construed the EAJA to permit attorney's fees awards for the considerable time required of counsel

in the mandatory post-remand administrative proceedings which are necessary to establish the entitlement to benefits. Even if the Secretary's interpretation of the appropriate timeframe for the filing of an EAJA application following a fourth sentence remand order is correct, the scope of the Court's substantive holding in *Hudson* is undiminished. Acceptance of the Secretary's invitation to nullify *Hudson* will turn the EAJA on its head, and ensure that many needy and disabled persons, whose applications for benefits are wrongly denied by the Secretary, will never be able to vindicate their claims.

ARGUMENT

I. RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT WAS TIMELY FILED

A. The EAJA filing period may only be triggered by a district court judgment entered after the claimant has won entitlement to benefits

In *Sullivan v. Hudson*, 490 U.S. 877 (1989), the Court had before it a typical claim arising under 42 U.S.C. § 405(g) for judicial review of the administrative denial of disability benefits. In that case the district court had affirmed the Secretary's denial of benefits, but the Court of Appeals reversed the decision of the district court, vacated the Secretary's administrative denial, and instructed the lower court to remand the claim for further administrative proceedings necessary to correct a number of legal errors committed by the Secretary in evaluating plaintiff's claim. *Id.* at 880-81. Pursuant to the district court's remand order, the Secretary re-evaluated plaintiff's claim under the standards required by law, and granted the application for benefits. *Id.* at 881.

Following issuance of the final administrative decision awarding benefits on remand, the Secretary advised the district court of plaintiff's final administrative victory on remand, and obtained an order dismissing plaintiff's claim for judicial review. *Id.* at 882. Notwithstanding its dismissal order, the district court, as this Court noted, "retained jurisdiction over the action for the limited purpose of considering any petition for the award of attorney's fees." *Hudson*, 490 U.S. at 882.

The plaintiff then filed a petition for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), which the district court denied because in its view the Secretary's position had been "substantially justified" within the meaning of § 2412(d)(1)(A). *Id.* at 882. However, the Court of Appeals reversed the district court's substantial justification ruling, and held in addition that the EAJA permits an award of fees for time incurred in the post-remand administrative proceedings as well as in the litigation itself. *See* 490 U.S. at 882-83. It was with respect to this latter holding that the Court granted the Secretary's petition for certiorari. 490 U.S. at 883.

The task before this Court in *Hudson* was to determine "the most reasonable interpretation of the [EAJA] in light of its manifest intent." 490 U.S. at 889. That intent, held the Court, is "to diminish the deterrent effect of seeking review of, or defending against, governmental action," 490 U.S. at 890 (citation omitted), and to reduce the number of persons who, due to the prohibitive costs of litigation against the government, are forced "to endure an injustice [rather] than to contest it." 490 U.S. at 883, quoting S.Rep. No. 96-253, p. 5 (1979).

In interpreting whether the post-remand administrative proceedings were to be considered part of the civil

"action" for EAJA purposes under 28 U.S.C. § 2412(d)(1)(A), the Court necessarily engaged in a detailed examination of the "somewhat unusual" judicial review provisions under § 405(g), which provide "a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act." 490 U.S. at 885. In particular, in cases like *Hudson* itself, where "the Secretary has committed a legal or factual error in evaluating a particular claim," the district court's remand order will often instruct the Secretary to address "complex legal issues" on remand. *Ibid.* The Court observed that "[d]eviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review," and accordingly the district court retains jurisdiction over such cases "to assure that its prior mandate is effectuated." *Id.* at 886.

After laying the foundation of these universally acknowledged jurisdictional principles applicable to a disability claim remanded for legal error under § 405(g), replete with numerous circuit court citations dating to 1967, this Court then highlighted the "[t]wo points important to the application of the EAJA" in § 405(g) cases:

> First, in a case such as this one, where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party status' within the meaning of § 2412(d)(1)(A) until after the results

> of the administrative proceedings on remand are known.

490 U.S. at 886[6]

Second, because "the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary," there often will be no "final judgment" triggering the day EAJA application period, 28 U.S.C. 2412(d)(1)(B), "until the administrative proceedings on remand are complete." 490 U.S. at 887-88.

Significantly, for purposes of evaluating the Secretary's current position on these matters, it bears emphasis that *none* of the above-described propositions set forth in *Hudson* were disputed by the Secretary. Indeed, as this Court specifically noted, "[t]he Secretary concedes that a remand order from the district court to the agency is not a final determination of the civil action and that the district court retains jurisdiction to review any determination rendered on remand." 490 U.S. at 887 (quotation from Secretary's brief omitted).[7]

Finally turning to the specific question presented in *Hudson*, the Court observed that

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[6] The Court noted that the prerequisite of an administrative award of benefits for qualification as an EAJA "prevailing party" in a § 405(g) case was in accord with "the vast majority" of the circuit court holdings on the issue. 490 U.S. at 887.

[7] The Secretary's return to the district court to obtain a final dispositive order following the post-remand award of benefits in *Hudson* was simply consistent with the procedure he had agreed was appropriate in *all* remanded cases, including those remanded for the correction of legal error. *See Brown v. Secretary of HHS*, 747 F.2d 878, 884 (3d Cir. 1984); 54 Fed.Reg. 37,789, 37,791 (1989).

> [g]iven the "mandatory" nature of the administrative proceedings at issue here, and their close relation in law and fact to the issues before the district court on judicial review, we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline it knew was a foot short . . . Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA, Congress cannot lightly be assumed to have intended it.

490 U.S. at 889-90 (citations omitted). Accordingly, the Court held that the administrative proceedings on remand in a § 405(g) case constitute a sufficient part of the civil "action" described in 28 U.S.C. § 2412(d)(1)(A) to permit an award of EAJA fees for services performed on remand before the Social Security Administration. *Id.* at 890.

B. The Court's decisions in *Finkelstein* and *Melkonyan* do not require abandonment of the precedure approved in *Hudson*

In *Hudson* neither this Court nor the Secretary had any doubt whatsoever that, in a routine case remanded under § 405(g) for correction of legal or factual errors committed by the Secretary, claimant's petition for EAJA fees could not be filed or entertained until *after* (1) receipt of an administrative award of benefits on remand, and (2) entry of a "final judgment" acknowledging the favorable administrative decision. Yet in his eagerness to overturn *Hudson*'s ruling on the *substantive* scope of the EAJA, the Secretary has no qualms in abandoning these fundamental principles of EAJA *procedure* he had endorsed without question in *Hudson*. This Court's recent decisions in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990) and *Melkonyan v.*

Sullivan, 111 S.Ct. 2157 (1991) have prompted the Secretary to discard the post-remand EAJA filing period delineated by *Hudson*, notwithstanding express language in both opinions disavowing inconsistency with *Hudson*. *See Finkelstein*, 496 U.S. at 629-30; *Melkonyan*, 111 S.Ct. at 2162.

The Secretary's most current reading of these decisions leads him to contend that a claimant whose disability case is remanded for correction of legal errors must file his or her EAJA application for attorney's fees within thirty days of the expiration of the period for appeal of the remand order. Pet. Br. at 26. However, at that point such a claimant will not yet have obtained a final administrative award of benefits on remand, and thus cannot satisfy the "prevailing party" criterion described in *Hudson*.[8] Since the "prevailing party" analysis is the one aspect of *Hudson* which the Secretary cannot afford to jettison, *see infra* at 21, he responds to this dilemma with a non-sequitur: the claimant must allege that he is a prevailing party before the "definitive determination" of "full prevailing party status" can be made. Pet. Br. at 26-27. Although in the Secretary's novel scheme this two-step prevailing party inquiry necessarily cannot be completed until "later," Pet. Br. at 27, the precise details of the procedure are left unexplained.[9]

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[8] *See Fergason v. Sullivan*, 771 F.Supp. 1008, 1013 (W.D.Mo. 1991), citing Social Security Administration statistics indicating that it takes an average of 10.1 months to secure an Administrative Law Judge's decision following a rehearing held pursuant to a court-ordered remand.

[9] The Secretary's initial strategy in response to claimants who, after *Melkonyan*, protectively filed EAJA applications within ninety days of a fourth sentence remand order, was to oppose the application for inability to demonstrate prevailing party status at that time. If that opposition proved successful, and the claimant subsequently filed an EAJA application following a favorable administrative decision on remand, the Secretary would oppose *that* application as untimely. The district courts did not, by and large, find this strategy acceptable. *See, e.g., Prasad v. Sullivan*, No. C-90-1435 SC (N.D.Cal.Nov. 21, 1991) (unpublished), at 3 ("The Secretary is engaging in petty games which needlessly drain its own, and this court's, resources . . . The logical result of the Secretary's position . . . is contrary to the EAJA itself, and the Congressional intent which underlies it.")

For the reasons explained at length by respondent, *amici* fully agree that the only sensible way to harmonize this Court's precedent with the structure and intent of both the EAJA and § 405(g) is to identify the triggering event for the EAJA filing period as the dispositive district court judgment entered subsequent to a final administrative award of benefits obtained following a remand for the correction of legal or factual error. *See, e.g., Labrie v. Sec'y of HHS*, 976 F.2d 779, 785-86 (1st Cir. 1992); *Hafner v. Sullivan*, 972 F.2d 249, 250-51 (8th Cir. 1992).

With respect to the Secretary's insistence that *Finkelstein* and *Melkonyan* foreclose such a result, *amici* will make only a few brief points. First, the issue in *Melkonyan* was merely whether the triggering EAJA "judgment" is a document issued by a court or by the Social Security Administration. 111 S.Ct. at 2159. *Melkonyan* did not involve, as *Hudson* did, a remand ordered for the correction of legal error (a so-called fourth sentence remand), and there is no indication that the substantive ramifications of the Court's discussion, in *dicta*, of the appropriate EAJA filing period in such cases were raised or considered by the Court.

Second, it should be emphasized that the Court's decision in *Finkelstein*, which first drew the distinction

between sixth sentence "new evidence" remands and fourth sentence "legal error" remands, carefully distinguished its analysis of the "finality" of a fourth sentence remand order for purposes of appellate jurisdiction under 28 U.S.C. § 1291, from any interpretation of "finality" for EAJA purposes. 456 U.S. at 629 n.8. Furthermore, the Court did *not* decide whether a fourth sentence remand order constituted a final and appealable decision for the *claimant*: "The question before us is whether orders of the type entered by the District Court in this case are immediately appealable *by the Secretary*." *See* 496 U.S. at 673 & n.3 (emphasis supplied). If a fourth sentence remand does not constitute a "final decision" under § 1291 from which the *claimant* may take an appeal, it obviously cannot constitute a "final judgment" for EAJA purposes as well. The Court's primary concern in *Finkelstein* was thus to assure the *Secretary* of an opportunity for immediate review of an adverse decision which, like the decision at issue therein, effectively invalidated regulatory or statutory provisions of general applicability in disability cases. *See* 496 U.S. at 623.

Amici submit that the policies underlying the holdings of both *Finkelstein* and *Melkonyan* will be undisturbed by reaffirming the propriety of the EAJA filing period described in *Hudson* for cases remanded for the correction of legal error committed by the Secretary. The respondent's application for EAJA attorney's fees in this case was timely filed.

C. The Secretary's proposed EAJA application procedure in fourth sentence remand cases is contrary to the statutory prescription for the application, and will needlessly waste vast resources of disability claimants and the courts

As set forth *supra* at 16 & n.9, the Secretary has, after some initial experimentation, decided that in cases remanded for the correction of legal error, the claimant must file an EAJA application within ninety days of the remand order, long *before* she or he (1) qualifies as a "prevailing party" under the standard set forth in *Hudson*, and (2) can fully assess whether or not the position of the Secretary has been "substantially justified" within the meaning of 28 U.S.C. § 2412(d)(1)(A). Pet. Br. at 25-26. However, § 2412(d)(2)(B) requires that *all* EAJA applications "show" that the party seeking fees is a prevailing party and "allege" that the position of the United States was not substantially justified. In prescribing these requirements, Congress could not have intended that litigants seeking EAJA fees attest to entitlement preconditions which in fact have not been met. *See Parsons v. Sullivan*, 140 F.R.D. 352, 358 (S.D.Ohio 1992) (Secretary's proposal "would require a party to file a petition which could not possibly comply with the statutory mandate.").[10]

In addition, the Secretary's procedure will needlessly waste vast litigation resources and "senselessly clutter[] court dockets" with protective fee "applications" filed in thousands of cases which the plaintiff does not even win. *See Hafner v. Sullivan*, 972 F.2d at 249-50. For example, in

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[10] The execution of such an application arguably would constitute a violation of counsel's warranty that the representations contained therein were "well grounded in fact" pursuant to Fed.R.Civ.P. 11.

38% of the 4343 cases remanded by the district courts for further administrative proceedings in 1990, the claimant failed to obtain a favorable decision on remand. Social Security Administration, *Annual Report to Congress* 38 (Apr. 1992). *Amici* estimate that well over 90% of all § 405(g) remands must be characterized as fourth sentence remands. *See infra* at 23. Since ethical counsel *must* apply for EAJA fees in order to minimize their client's attorney fee costs, the Secretary's regime will cause thousands of fee applications to be filed by claimants who obtain fourth sentence remands but never are awarded benefits.[11] Even for those claimants who do obtain a favorable decision on remand, the Secretary's procedure will require additional, as yet undescribed post-remand filings to confirm the achievement of "full prevailing party status", Pet. Br. at 28, and to claim additional compensation for time incurred in the administrative proceedings on remand.

In short, the procedure outlined by the Secretary is absurd, which may explain why, as the First Circuit has observed, it "has gained no judicial adherents." *Labrie*,

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[11] 42 U.S.C. § 406(b) permits an award of fees to be withheld directly from a claimant's disability insurance benefits, not to exceed 25% of the past due amount, in order to effectuate an appropriate contractual agreement between the claimant and counsel. *See Bowen v. Galbreath*, 485 U.S. 74 (1988). If fees are also awarded under the EAJA, counsel must refund the lesser of the two awards to the claimant, in order to minimize the claimant's out-of-pocket fees costs. *See* Pub. L. No. 99-80, § 3 (1988), 99 Stat. 186 (28 U.S.C. § 2412 note); *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991). It has been held that counsel who intend to apply for fees under § 406 *must* first seek EAJA fees, or provide detailed notice to their clients and the court of the reasons for not filing an EAJA application. *Taylor v. Heckler*, 608 F.Supp. 1255, 1259-61 (D.N.J. 1985).

976 F.2d at 785 n.17 (further citations omitted).[12] Its unworkable awkwardness derives from the Secretary's desire to use the procedural discussion in *Melkonyan* to preclude EAJA compensation for the administrative proceedings which necessarily follow a fourth sentence remand, but to avoid at all costs the logical corollary to his theory, which is that in light of *Melkonyan* the issuance of a fourth sentence remand alone is sufficient to confer prevailing party status under the EAJA.[13] Thus the Secretary's agenda for *substantive* EAJA limitation has yielded a counterintuitive and grossly inefficient theory of EAJA *procedure*, which Congress could not possibly have intended in fashioning this statute.

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[12] Judicial hostility to the Secretary's scheme can hardly be exaggerated. *See, e.g., Parsons*, 140 F.R.D. at 358. *Amici* are aware of cases where the claimant and Secretary have *stipulated* that a fee petition filed pursuant to the Secretary's timeline in a fourth sentence remand should be held in abeyance, pending conclusion of the proceedings on remand, and the court has refused to honor the stipulation. *See Xiong v. Sullivan*, No. CIV-S-91-0860 DFL GGH (E.D.Cal. Feb. 2, 1993) (Magistrate Judge's recommendation) (unpublished) at 3-4.

[13] A growing number of district courts have so held. *See, e.g., Gagnon v. Sullivan*, 792 F.Supp. 873, 874 (D.Me. 1992); *Thomas for Brown v. Sullivan*, 785 F.Supp. 788, 792 (C.D.Ill. 1992); *Rollins v. Sullivan*, 784 F.Supp. 253, 254, 258 (E.D.Pa. 1992); *Spurlock v. Sullivan*, 783 F.Supp. 474, 479 (N.D.Cal. 1992); *Mills v. Sullivan*, 782 F.Supp. 1347, 1349 (W.D.Mo. 1992); *Lopez v. Sullivan*, 780 F.Supp. 496, 502 (N.D.Ill. 1991); *Sesker v. Sullivan*, 779 F.Supp. 1042, 1044 (W.D.Mo. 1991); *Audette v. Sec'y of HHS*, 776 F.Supp. 84, 91 (D.R.I. 1991); *Dow v. Sullivan*, 774 F.Supp. 46, 48-49 (D.Me. 1991).

II. EVEN IF THE SECRETARY'S INTERPRETATION OF THE APPROPRIATE FILING PERIOD FOR EAJA APPLICATIONS IN CASES INVOLVING FOURTH SENTENCE REMANDS IS CORRECT, THE COURT'S HOLDING IN *HUDSON* CANNOT BE LIMITED TO SIXTH SENTENCE REMANDS

The two types of remand orders authorized by § 405(g) are those in which the court rules in some way "as to the correctness of the administrative determination" (i.e., a "fourth sentence" remand), and those in which the court does *not* make any substantive ruling, but rather "remands because new evidence has come to light that was not available to the claimant at the time of the administrative proceeding and that evidence may have changed the outcome of the prior proceeding" (i.e., a "sixth sentence" remand). *Melkonyan*, 111 S.Ct. at 2163.[14] It is undisputed that *Hudson* involved a fourth sentence remand ordered to correct legal errors committed by the Secretary in evaluating plaintiff's disability claim. 490 U.S. at 880-81; *Labrie*, 976 F.2d at 783 n.8; Pet. Br. at 24.

Neither the specific holding interpreting the underlying intent of the EAJA in *Hudson*, nor any of its supporting analysis, make any sense whatsoever outside the context of a case remanded because the Secretary has wrongly evaluated and denied a disability claim. All of *Hudson*'s (undisputed) observations regarding the district court's continuing oversight of the post-remand administrative proceedings, and of counsel's necessary role in

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[14] A "subcategory" of sentence six permits a remand "on motion of the Secretary for good cause shown before he files his answer." *Melkonyan*, 111 S.Ct. at 2163, quoting § 405(g). No substantive ruling presumably would be issued by the Court in conjunction with such a remand.

those proceedings "both to ensure compliance with the district court's order . . . and to prepare for any further proceedings before the district court to verify such compliance," assumed a predicate finding "that the Secretary has committed a legal or factual error in evaluating a particular claim." 490 U.S. at 889, 887.

Although he does not highlight the consequences of his contention that "*Finkelstein* and *Melkonyan* necessarily limit *Hudson* to cases remanded pursuant to sentence six," Pet. Br. at 25, it presumably has not been lost on the Secretary that such a "limitation" would in fact reduce the number of claimants who would qualify for post-remand attorney's fees to nearly zero, for two reasons.

First, in *amici*'s experience, the percentage of remands which comply with the "good cause" and "material new evidence" standards of sentence six is extremely small, and certainly less than 10%.[15] In addition, in *amici*'s experience the Secretary rarely exercises his independent prerogative under sentence six to seek a remand, for good cause, *prior* to the filing of his answer, as required by § 405(g).[16]

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[15] The regulations themselves provide ample opportunity for the submission or obtaining of "new and material" evidence *prior* to issuance of the Secretary's final administrative decision. *See, e.g.*, 20 C.F.R. § 404.976(b). Common sense suggests that the number of cases in which *more* "new" evidence (relating back in time to the period of disability alleged by the claimant) is discovered *after* the final administrative denial, must be extremely small.

[16] To the contrary, the Secretary has represented in litigation that typically his counsel are unable to consider the propriety of a remand until *after* the administrative record, which must be filed in conjunction with the Secretary's answer pursuant to § 405(g), is compiled and reviewed. *Spurlock v. Sullivan*, 790 F.Supp. 779, 982 (N.D.Cal. 1992).

Second, although the entire universe of true sentence six remands is thus a tiny one, its subset of cases in which a claimant might actually be awarded EAJA fees is infinitely smaller still.[17] It is difficult to imagine how a claimant who obtains a post-remand award of benefits, based on evidence which by definition was not available at the time of the initial decision, will ever be able to demonstrate that the Secretary's position in originally denying the claim was "not substantially justified" within the meaning of § 2412(d)(1)(A). The lower courts typically have refused to find an initial administrative denial to be without substantial justification, where the subsequent favorable decision on remand relied on evidence or claims not raised by the plaintiff in the original proceeding.[18]

As *Hudson* acknowledged, the EAJA was intended to encourage judicial review of governmental action which has caused "injustice." 490 U.S. at 883, quoting S.Rep. No. 96-253, p. 5 (1979). In the disability context, such injustices arise not in the context of the few exceptional cases which qualify for sixth sentence remands, but in those

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[17] In the wake of *Melkonyan*, a number of district courts sought to avoid the unjust result dictated by the Secretary's timeliness arguments by construing the pre-*Melkonyan* remand order as a "sixth sentence" remand. *See infra* App. 3a. Although in fact few if any of those orders actually met the prerequisites for a sentence six remand, some of the linguistic endeavors of those courts which held to the contrary were truly heroic. *See, e.g., Rivera-Sanchez v. Sec'y of HHS*, 786 F.Supp. 147, 148-149 (D.Puerto Rico 1992) ("plausible to view the Secretary's motion to remand as a hybrid sentence six remand/request sentence six subcategory request").

[18] *See, e.g., Reeves v. Bowen*, 841 F.2d 383, 385 (11th Cir. 1988); *Rosado v. Bowen*, 823 F.2d 40, 43 (2d Cir. 1987); *Desrouchers v. Heckler*, 701 F.Supp. 753, 757 (D.Nev. 1988).

numerous claims, all too familiar to the district courts which review them, where the Secretary's unreasonable and unlawful conduct has required years of multiple administrative and judicial proceedings to finally establish that in fact the claimant had been disabled and entitled to benefits all along.[19] In his attempt to evade liability for the substantial litigation costs incurred by hundreds of such disabled claimants as a direct result of his unreasonable denial of their benefit application, the Secretary now seeks to effectively sever the EAJA "lifeline" which Congress extended in the hope that at least some of these wrongs will be remedied by competent representation in an action for federal court review under § 405(g).

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[19] *See, e.g., Defrancesco v. Sullivan*, 803 F.Supp. 1332, 1337 (N.D.Ill. 1992) (two district court decisions, one circuit court decision, and various administrative appeals, all caused by position of Secretary which was "inconsistent, illogical, untenable, and contrary to regulations and Social Security Rulings"); *Lindner v. Sullivan*, 799 F.Supp. 888, 892 (N.D.Ill. 1992) (multiple rounds of judicial and administrative appeals; Secretary did not contend that his conduct in opposing plaintiff's claim was substantially justified); *Misciagno v. Sec'y of HHS*, 786 F.Supp. 1120, 1122 (E.D.N.Y. 1992) (after two district court remands, and three successive unfavorable decisions by the same ALJ, district court ordered payment of benefits); *Butts v. Bowen*, 775 F.Supp. 1167, 1168 (N.D.Ill. 1991) (ten years of litigation and administrative hearings required before Secretary agreed that plaintiff had been disabled since 1980; "clear legal errors" of the ALJ rendered Secretary's position without substantial justification); *Sullivan v. Sullivan*, 738 F.Supp. 332, 333 (W.D.Mo. 1990) (two district court remands and administrative decisions required because Secretary "repeatedly ignore[d]" applicable circuit precedent governing evaluation of claim); *Hawkins v. Heckler*, 608 F.Supp. 1201, 1204-05 (D.Kan. 1985) (action of Appeals Council in disregarding remand order was "contemptuous" and an "outrageous example of the abuse of governmental authority").

In addition, although it is not fully spelled out in his opening brief, the Secretary's agenda for eliminating his exposure for claimants' post-remand attorney's fees presumably includes an argument that, after *Finkelstein*, a claimant who desires judicial review of an unfavorable administrative decision following a fourth sentence remand must file a new *complaint* with the district court. *See* Pet Br. at 13-14. Although the Court in *Finkelstein* indicated only that such a decision would be reviewable by "a separate piece of litigation," 496 U.S. at 625, one court has read that language to require the filing of an entirely new complaint. *Frizzell v. Sullivan*, 937 F.2d 254, 256-57 (5th Cir. 1991).

Since *Finkelstein* did not decide that a fourth sentence remand order was a final and appealable decision as to the *claimant*, 496 U.S. at 623 n.3, the "new piece of litigation" needed to obtain review over the administrative decision on remand is not necessarily a new complaint. As *Hudson* explained, the unusual relationship between the courts and the agency engendered by the review provisions of § 405(g) permits the courts to retain jurisdiction over remanded cases in order to "ensure compliance with the district court's order in the administrative proceedings themselves and to prepare for any further proceedings before the district court . . . " *Hudson*, 490 U.S. at 889.[20] The Secretary expressly agreed with this

[20] District court intervention *prior* to a final administrative decision on remand is not infrequently required simply to enforce compliance with its order. *See, e.g., Carrillo v. Bowen*, 636 F.Supp. 97, 99 (D.Ariz. 1986) (order directing Appeals Council to either affirm or reverse the ALJ's decision); *Pierce v. Heckler*, 620 F.Supp. 320, 323 (D.Ariz. 1985) (order directing Appeals Council to terminate "[t]he constant remanding and re-remanding" of the ALJ's favorable decision); *compare Key v. Sullivan*, 925 F.2d

proposition, *id.* at 887, and he generally has acquiesced in the process by which claimants frequently have returned, sometimes more than once, to the district court (through the procedural mechanisms of motions to reopen, or renewed motions for summary judgment, or motions for leave to file a supplemental complaint), in order to obtain review of the Secretary's decision on remand.[21]

The Secretary cannot seriously dispute that the filing of a new complaint in all such actions will entail a significant amount of wasted paperwork, require the consolidation of files and duplication of administrative transcripts, and give rise to various motions for judicial reassignment in order to prevent a second judge from needlessly attempting to discern the intent of his or her colleague's original remand order. However, this remarkably inefficient procedure will enable the Secretary to argue that, should he eventually lose after the second (or third) time around in district court, the claimant cannot claim EAJA fees for *any* time incurred either in the prior civil actions

1056, 1061, 1063 (7th Cir. 1991) ("after so many years of hearings, rehearings, and appeals," the claimant "should receive, and receive immediately, the benefits to which she long has been entitled," particularly where "[t]he Secretary clearly exceeded the scope of the remand order").

[21] In *Wilson v. Heckler*, 609 F.Supp. 120, 124 (W.D.Mo. 1985), the Secretary successfully persuaded the district court that plaintiff's filing of a new complaint to challenge the adverse administrative decision on remand was needlessly "duplicative," and the court determined that, although a remanded Social Security case may be "administratively closed," it will be "reopened" upon request of either party, and "[n]either a new file number, nor a new judge, is assigned." *See also* the various procedural histories recounted in the cases cited *supra* n.19.

or in the intervening administrative proceedings.[22] Such a position utterly defeats the intent of the EAJA to encourage counsel to continue their representation of plaintiffs through the interminable processes often necessary to finally establish entitlement to benefits. *Hudson*, 490 U.S. at 889-90.

Finally, and most troubling, is that the nullification of *Hudson* will cause the greatest injury to those claimants most in need of the relief which Congress extended through the EAJA. Thousands of claims for disability benefits annually arise under Title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq. (the Supplemental Security Income program), which was established to "provide[] a subsistence allowance, under federal standards, to the nation's needy aged, blind, and disabled." *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981). Unlike the disability insurance program established under Title II of the Act, 42 U.S.C. § 401 *et seq.*, the SSI program is a "welfare program" whose beneficiaries are, by definition, in "extreme financial need." *Bowen v. Galbreath*, 485 U.S. 74, 75, 77 (1988).

Little incentive exists for counsel to represent claimants seeking SSI benefits. First, in contrast to the sizeable monthly payments often awarded under Title II, the maximum monthly SSI benefit is meager, thus reducing the

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[22] Presumably, the Secretary is not unaware that EAJA fee awards in such cases are necessarily substantial. *See, e.g., Defrancesca*, 803 F.Supp. at 1338 ($26,421 awarded); *Butts*, 775 F.Supp. at 1173 ($13,836 awarded); *compare Commissioner, INS v. Jean*, 496 U.S. 154, 161 n.9 (1990) (average EAJA award in 1989 was $4,482).

amount of any potential retroactive award.[23] Second, any eventual SSI award is retroactive only to the date of application; under Title II, the award may include the twelve month period prior to application.[24] Third, in contrast to Title II cases, counsel cannot obtain prompt and full payment on a contingency contract with an SSI claimant through the Secretary's withholding of a portion of the retroactive award, since the withholding provisions of 42 U.S.C. § 406(b)(1) are inapplicable to SSI cases. *Bowen v. Galbreath*, 485 U.S. at 79. Fourth, and most important, is the fact that SSI disability claims often are inherently more difficult to win on the merits. Desperately poor persons cannot afford health care, and typically there exists scant medical documentation needed to prove the claim. The cost to counsel of obtaining expert examinations often is not worth the risk of non-reimbursement.

For all of these reasons, the prospect of compensation under the EAJA provides the *only* inducement for representation of SSI claimants, and certainly is a primary incentive for the undertaking of Title II cases as well. *See Sansano v. Sullivan*, 788 F.Supp. 218, 219 (D.N.J. 1992) ("Without the prospect of an award of attorney's fees, it is unlikely that the wrongful denial of Social Security benefits would ever be vindicated."). Therefore, this Court must not accept the Secretary's invitation to "snatch away a lifeline it [has] previously dangled within the Social Security claimant's grasp," and to "pierce the heart of the intent of the EAJA." *Sansano*, 788 F.Supp. at 224. Even if

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[23] Currently the federal SSI monthly benefit rate for a single person is $434. 57 Fed.Reg. 48619 (Oct. 27, 1992).

[24] *Compare* 20 C.F.R. § 404.621(a)(1)(ii) *with* 20 C.F.R. § 416.335.

the Secretary's interpretation of the appropriate filing period in a fourth sentence remand is correct, no reason exists to deny compensation for time incurred in the post-remand administrative proceedings.[25] The Court should explicitly reject the Secretary's request to render *Hudson* meaningless by limiting its holding to sixth sentence remands, and confirm that respondent's EAJA application was timely filed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[25] Since under the Secretary's theory the district court must hold in abeyance the claimant's EAJA application until after the administrative proceedings are concluded, Pet. Br. at 26-27, the district court certainly could permit amendment of the application to include a claim for time incurred subsequent to the remand. *Myers v. Sullivan*, 916 F.2d 659, 679 n. 20 (11th Cir. 1990).

I. COURT OF APPEALS DECISIONS REJECTING THE SECRETARY'S *MELKONYAN*-RELATED EFFORT TO BAR, AS UNTIMELY, A PLAINTIFF'S POST-REMAND APPLICATION FOR ATTORNEY'S FEES UNDER THE EAJA

Gray v. Sullivan, ___F.2d___, No. 91-55380 (9th Cir. Jan. 15, 1993);
Carter v. Sullivan, 976 F.2d 1197 (8th Cir. 1992);
Labrie v. Secretary of HHS, 976 F.2d 779 (1st Cir. 1992);
Scanlon v. Sullivan, 974 F.2d 107 (9th Cir. 1992);
Young v. Sullivan, 972 F.2d 830 (7th Cir. 1992);
Hafner v. Sullivan, 972 F.2d 249 (8th Cir. 1992);
Baker on behalf of Baker v. Sullivan, 956 F.2d 234 (11th Cir. 1992);
Gutierrez v. Sullivan, 953 F.2d 579 (10th Cir. 1992), *cert. pending*, No. 92-361;
Richard v. Sullivan, 955 F.2d 354 (5th Cir. 1992);
Cummings v. Sullivan, 955 F.2d (7th Cir. 1991);
Luna v. U.S. Dept. of HHS, 948 F.2d 169 (5th Cir. 1991);
Damato v. Sullivan, 945 F.2d 982 (7th Cir. 1991);
Sargent v. Sullivan, No. 90-1521 (4th Cir. Aug. 22, 1991) (unpublished).

II. DISTRICT COURT DECISIONS REJECTING THE SECRETARY'S *MELKONYAN*-RELATED ARGUMENTS RAISED IN CONNECTION WITH PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES UNDER THE EAJA

1. Cases holding that the court retains jurisdiction to entertain EAJA application filed subsequent to conclusion of post-fourth sentence remand administrative proceedings

Ryder v. Sullivan, 804 F.Supp. 1365 (D.Colo. 1992)
Bodner v. Sullivan, 804 F.Supp. 23 (N.D.Cal. 1992)
Baker v. Sec'y of HHS, 799 F.Supp. 232 (D.N.H. 1992)
Lenz v. Sec'y of HHS, 798 F.Supp. 69 (D.N.H. 1992)
Rodriguez v. Sec'y of HHS, 794 F.Supp. 58 (D.Puerto Rico 1992)
Mendez v. Sullivan, 792 F.Supp. 375 (E.D.Pa. 1992)
Kling v. Sec'y of HHS, 790 F.Supp. 145 (N.D.Ohio 1992)
Van Tassell v. Sullivan, 789 F.Supp. 1108 (D.Colo. 1992)
Winn v. Sullivan, 787 F.Supp. 172 (E.D.Mo. 1992)
Sparling v. Sullivan, 785 F.Supp. 312 (N.D.N.Y. 1992)
Heredia v. Sullivan, 783 F.Supp. 1550 (D.Puerto Rico 1992)
Carter v. Sullivan, 782 F.Supp. 1251 (N.D.Ill. 1991)
Muniz v. Sullivan, 780 F.Supp. 743 (D.Colo. 1992)
Linkins v. Sullivan, 779 F.Supp. 1324 (M.D.Fla. 1991)
Thomas v. Sullivan, 778 F.Supp. 473 (W.D.Mo. 1992)
Merryman v. Sullivan, 778 F.Supp. 475 (W.D.Mo. 1991)
Lineberry v. Sullivan, 778 F.Supp. 1087 (W.D.Mo. 1992)
Parsons v. Sullivan, 140 F.R.D. 352 (S.D.Ohio 1992)

2. Cases in which courts declined to apply *Melkonyan's* fourth sentence remand timeliness discussion retroactively

Defrancesco v. Sullivan, 803 F.Supp. 1332 (N.D.Ill. 1992)
Carrol v. Sullivan, 802 F.Supp. 295 (C.D.Cal. 1992)
Lindner v. Sullivan, 799 F.Supp. 888 (N.D.Ill. 1992)
Sansano v. Sullivan, 788 F.Supp. 218 (D.N.J. 1992)
Green v. Sullivan, 788 F.Supp. 275 (W.D.Va. 1992)
Bacon v. Sec'y of HHS, 786 F.Supp. 434 (D.N.J. 1992)
Thomas for Brown v. Sullivan, 785 F.Supp. 788 (C.D.Ill. 1992)
Rollins v. Sullivan, 784 F.Supp. 253 (E.D.Pa. 1992)
Santiago v. Sullivan, 783 F.Supp. 223 (E.D.Pa. 1992)
Lopez v. Sullivan, 780 F.Supp. 496 (N.D.Ill. 1991)
Sykes v. Sullivan, 779 F.Supp. 29 (E.D.Pa. 1991)
Butts v. Bowen, 775 F.Supp. 1167 (N.D.Ill. 1991), *reaff'd*, 778 F.Supp. 453 (N.D.Ill. 1991)

3. Cases in which courts construed the remand at issue as a "sentence six" remand

Rivera-Sanchez v. Sec'y of HHS, 786 F.Supp. 147 (D.Puerto Rico 1992)
Robinson v. Sullivan, 783 F.Supp. 245 (E.D.N.C. 1991)
Kolman v. Sullivan, 782 F.Supp. 423 (E.D.Wis. 1992)
Burr v. Sullivan, 782 F.Supp. 1285 (N.D.Ill. 1992)
Hudson v. Sullivan, 779 F.Supp. 37 (W.D.Pa. 1991)
Johnson v. Sullivan, 779 F.Supp. 1277 (D.S.C. 1991)
Thomas v. Sullivan, 778 F.Supp. 473 (W.D.Mo. 1992)
Woods v. Sullivan, 778 F.Supp. 976 (N.D.Ill. 1991)

4. Cases in which courts have held that the claimant qualifies as a "prevailing party" simply by virtue of obtaining a "fourth sentence" remand order

Gagnon v. Sullivan, 792 F.Supp. 873 (D.Me. 1992)
Spurlock v. Sullivan, 783 F.Supp. 474 (N.D.Cal. 1992), *reaff'd*, 790 F.Supp. 979 (N.D.Cal. 1992)
Mills v. Sullivan, 782 F.Supp. 1347 (W.D.Mo. 1992)
Sesker v. Sullivan, 779 F.Supp. 1042 (W.D.Mo. 1991)
Dow v. Sullivan, 774 F.Supp. 46 (D.Me. 1991)

5. Cases in which courts retained jurisdiction following a remand order which was characterized as neither "fourth" nor "sixth" sentence in character

Petrie v. Sullivan, 800 F.Supp. 632 (N.D.Ill. 1992)
Ground v. Sullivan, 785 F.Supp. 557 (S.D.Cal. 1992)

6. Cases in which courts have equitably tolled the EAJA statute of limitations

Boronat v. Sullivan, 788 F.Supp. 557 (S.D.Fla. 1992)
Goldbach v. Sullivan, 779 F.Supp. 9 (N.D.N.Y. 1991)

7. Cases in which courts have reopened the judgment under Fed.R.Civ.P. 60(b)

Misciagno v. Sec'y of HHS, 786 F.Supp. 1120 (E.D.N.Y. 1992)

III. DISTRICT COURT DECISIONS ADOPTING THE SECRETARY'S *MELKONYAN*-RELATED ARGUMENTS TO BAR AN APPLICATION FOR ATTORNEY'S FEES UNDER THE EAJA AS UNTIMELY

Pettyjohn v. Sullivan, 801 F.Supp. 503 (W.D.Okla. 1992)
Salvador v. Sullivan, 786 F.Supp. 830 (N.D.Cal. 1992)
Audette v. Sec'y of HHS, 776 F.Supp. 84 (D.R.I. 1991)
Fergason v. Sullivan, 771 F.Supp. 1008 (W.D.Mo. 1991)